UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION,

Civil Action 2:13-md-2433
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth Preston Deavers

This document relates to: ALL CASES.

DISCOVERY ORDER NO. 11

Plaintiffs' Motion for Protective Order and Sanctions Regarding Expert Witness Discovery

This matter is before the Court on Plaintiffs' Motion for a Protective Order and Sanctions Relating to DuPont's Attempt to Circumvent the Discovery Process ("Motion for Protective Order") (ECF No. 4627), Defendant E. I. du Pont de Nemours and Company's ("DuPont('s)") Memorandum in Opposition (ECF No. 4634), and Plaintiffs' Reply in Support of their Motion (ECF No. 4660). For the reasons set forth below, the Court **DENIES IN PART AND DENIES AS MOOT IN PART** Plaintiffs' Motion for Protective Order.

I.

This MDL consists of over 3500 individual personal injury and wrongful death cases which are a subset of cases that originated in *Leach v. E. I. Du Pont de Nemours & Co.*, No. 01-C-608 (W. Va. Cir. Ct. Wood County Aug. 31, 2001) ("*Leach* Case"). All of the plaintiffs claim that they were injured by perfluorooctoanoic acid ("C-8"), which DuPont released from its Washington Works Plant near Parkersburg, West Virginia. In settling the *Leach* Case, DuPont and the *Leach* class plaintiffs agreed to stay the litigation until a world-class epidemiological

study of the individuals who claimed injury from the C-8 could be conducted. The seven year study concluded that "it is more likely than not that there is a link between exposure to C-8 and" six human diseases, including testicular cancer and kidney cancer. (*Leach* Settlement Agreement "S.A.," ECF No. 820-8.)

The Court has tried two bellwether cases, one chosen by DuPont and one chosen by the plaintiffs. DuPont's choice was a kidney cancer case brought by Carla Marie Bartlett (Case No. 2:13-cv-170), which resulted in a $1.6 million verdict in favor of Mrs. Bartlett. The plaintiffs chose David Freeman who suffered from testicular cancer (Case No. 2:13-1103.). His case ended in a $5.1 million verdict in his favor on the negligence claim and $500,000 on the claim for punitive damages.

In both of the bellwether trials, the plaintiffs offered Robert Bahnson, M.D., F.A.C.S. as an expert to opine on specific causation. Dr. Bahnson is a licensed medical doctor, a surgeon, and a Board Certified urologist, a field of medical specialization in diseases of the urinary tract and the male reproductive system, who has been practicing medicine for over thirty years. He is a Professor in the Department of Urology at The Ohio State University Wexner Medical Center, which is part of The Ohio State University Comprehensive Cancer Center. He practiced at the Arthur G. James Cancer Hospital and Richard J. Solove Research Institute, where he was a department chair and a previous Chief of Staff. Dr. Bahnson testified that he was not reappointed to department chair and that he stopped his clinical practice June 30, 2016. (Bahnson Dep. Tr. at 47–56, Def.'s Mem. in Opp. to Pls.' Mot. for Protective Order at Ex A, ECF No. 4634-1); (June 7, 2016 Freeman Trial Tr. at 173, *Freeman* ECF No. 112).

In the *Bartlett* trial, the plaintiff filed Plaintiff's Motion *in Limine* No. ("MIL") 3 to Exclude Evidence of an Unrelated Lawsuit and Settlement. (ECF No. 4082). Plaintiff moved

under Federal Rules of Evidence 402, 403 and 404(b) to exclude evidence that Dr. Bahnson was named in a defamation lawsuit involving a resident at his hospital, which settled with a confidential settlement agreement before Dr. Bahnson provided any testimony in the case. Mr. Freeman filed a similar MIL on this issue, requesting the same relief that Mrs. Bartlett requested in her MIL No. 3. (MIL No. 13, Mot. to Exclude Evidence of an Unrelated Lawsuit and Settlement, ECF No. 4429.) In both trials, the Court found that the motions were moot because DuPont indicated that it had no intention of using the information, and that if it changed its mind, it would approach the Court at side bar for an evidentiary ruling.

The Court and the parties are now in the process of preparing for trial of the non-bellwether cases. The first non-bellwether trial is scheduled to begin November 14, 2016, and is a testicular cancer case brought by Kenneth Vigneron, Sr. (Case No. 2:13-cv-136). The plaintiffs plan to again call Dr. Bahnson as the specific causation expert in Mr. Vigneron's trial, as well as other non-bellwether trials.

On March 16, 2016, DuPont sent a public records request under Ohio's Open Records Law, § 149.43 *et seq.* to The Ohio State University requesting Dr. Bahnson's personnel file. DuPont was provided information from The Ohio State University pursuant to this request on April 28, 2016. On August 24, 2016, DuPont served a subpoena on The Ohio State University to attempt to obtain additional materials related to Dr. Bahnson. The Ohio State University complied with the subpoena, providing DuPont with the requested discovery on September 7, 2016.

The plaintiffs request "a protective order pursuant to Fed. R. Civ. P. 26(c), and for sanctions pursuant to Fed. R. Civ. P. 37 and this Court's inherent equitable powers." (Pls.' Mot. at 1.) Plaintiff argues that:

> DuPont has improperly sent a subpoena to Ohio State University requesting specific information relating to a prior lawsuit involving Dr. Bahnson, which DuPont stated numerous times that it did not plan to use during either the *Bartlett* or *Freeman* trials, because the evidence would be a "distraction," cause "unfair prejudice and delay," and be a "waste of time." Plaintiffs' counsel also recently learned that DuPont sent a public records request to Ohio State University relating to Dr. Bahnson, but failed to provide the information it received pursuant to this request to Plaintiffs' counsel.

(*Id.*) Plaintiffs contend that DuPont's request for discovery is an "attempt to circumvent the discovery process in direct contravention of this Court's prior rulings regarding evidence relating to Plaintiffs' expert, Dr. Robert Bahnson, and his employment at Ohio State University." *Id.* Plaintiffs conclude that "DuPont's attempt to obtain the information that it has stated it does not need can only be interpreted as an attempt to harass and intimidate Dr. Bahnson, who has successfully testified twice on behalf of plaintiffs in this MDL and has since been designated as an expert witness on behalf of Plaintiff Kenneth Vigneron, Sr., as well as future cases pursuant to the schedule set forth in CMO 17. (*Id.* at 1–2) (citing Case Management Order No. ("CMO ") 17, ECF No. 4459 at 2).

DuPont responds that it is permitted to obtain the information because of Dr. Bahnson's "deceitful testimony," which has now put his credibility at issue. (Def.'s Mem. in Opp. to Pls.' Mot. for Protective Order at 2.) DuPont offers two examples of what it characterizes as deceitful testimony of Dr. Bahnson. DuPont further contends that it is entitled to the information regarding Dr. Bahnson's credibility "because, as in *Bartlett* and *Freeman*, DuPont expects that Plaintiff Vigneron's counsel will repeatedly attempt to build up Dr. Bahnson's credibility at trial through references to his alleged good character." (*Id.* at 3) (citing as examples July 5, 2016 Freeman Trial Tr. at 227, Freeman ECF No. 133) (plaintiff's counsel referring to Dr. Bahnson as "the esteemed doctor from James Cancer Hospital."); (Sept. 15, 2016 Bartlett Trial Tr. at 94, Bartlett ECF No. 154) (plaintiff's counsel claiming that Dr. Bahnson has had a "distinguished

career"); (Bartlett Trial Tr. at 89, Bartlett ECF No. 145) (plaintiff's counsel referring to "the good Dr. Bahnson" during closing arguments). While DuPont had previously suggested that the evidence at issue could cause "distraction, unfair prejudice, delay, and waste of time associated with mini-trials on collateral matters," it now indicates that it may wish to utilize this information to impeach Dr. Bahnson. (Def.'s Mem. in Opp. to MIL No. 3 at 2.)

DuPont further contends that it was not required to supplement the information it received pursuant to its public records request and/or the subpoena, because there was no previous discovery request from the plaintiffs for the information to supplement. And, DuPont continues, the plaintiffs request for sanctions should be denied for this reason as well. Finally, DuPont notes that the plaintiffs failed to exhaust extrajudicial resources as required under the Federal Rules, the Southern District of Ohio Local Rules, and a CMO issued in this MDL.

In the plaintiffs' reply, they assert that "DuPont's vague reference to 'additional information' and its claims that Dr. Bahnson's character is now at issue in this litigation because Plaintiffs' attorneys referred to Dr. Bahnson as 'good' during trial (Opp. at 3) should be seen for what it is – a blatant and unashamed attempt to harass, embarrass and intimidate Dr. Bahnson." (Pls.' Reply in Support of Mot. for Protective Order at 3.) The plaintiffs address DuPont's "serious accusation that Dr. Bahnson testified in an allegedly 'deceitful' manner during the *Freeman* trial and 'misled jurors,'" maintaining that the "accusation is not only false but is not supported by DuPont's citations to the supposed relevant pages of the trial transcript." *Id.*

II.

"Rule 26 of the Federal Rules of Civil Procedure provides that a person resisting discovery may move the court, for good cause shown, to issue an order protecting the person or

party from 'annoyance, embarrassment, oppression, or undue burden or expense [.]'" Fed. R. Civ. P. 26(c)(1). Under Rule 26, a court may limit the scope of the disclosure or discovery to certain matters. Fed. R. Civ. P. 26(c)(1)(D). The grant or denial of motions for protective orders falls within the "broad discretion of the district court in managing the case." *NGOC Tran v. Chubb Group of Ins. Companies*, 2:14-CV-447, 2015 WL 5047520, at *4 (S.D. Ohio Aug. 27, 2015) (citing *Conti v. Am. Axle & Mfg.*, No. 08-1301, 326 F. App'x 900, 903–04 (6th Cir. May 22, 2009); *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989)).

Rule 37, the enforcement mechanism for Rule 26 requirements, provides in pertinent part that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e) . . . the court, on motion and after giving an opportunity to be heard . . . may order payment of the reasonable expenses, including attorney's fees, caused by the failure." Fed. R. Civ. P. 37(c)(1)(A).

III.

This Court finds the plaintiffs' request for a protective order and sanctions partially moot and partially not well taken for four reasons. First, the plaintiffs' request for protection from discovery is moot because DuPont has already received the discovery it requested in the public records request and the subpoena. The *admissibility* of this evidence is *not* the issue presented to this Court in the plaintiffs' motion. Presumably, this will be an issue that will be raised in a motion *in limine* as it was in *Bartlett* and *Freeman*.

Second, as DuPont correctly contends, the duty to supplement arises where a "party learns that in some material respect [a] disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). The plaintiffs do not offer any argument or evidence that they had

previously propounded a discovery request that would require supplementation with the information DuPont received from the subpoena and public records request.

Third, because the plaintiffs have failed to show that DuPont had a duty to supplement under Rule 26, there is no support for the plaintiffs' request for sanctions.

Fourth, DuPont properly notes that the plaintiffs failed to follow the Civil and Local Rules Civil Rules and a CMO in this case. That is, both the Federal Rules and the Local Rules mandate that a party seeking an order limiting discovery must have first met and conferred with the opposing party before seeking intervention of the court. Fed. R. Civ. P. 26(c)(1) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."; S. D. Ohio Civ. R. 37.1 ("Objections, motions, applications, and requests relating to discovery shall not be filed in this Court under any provision in Fed. R. Civ. P. 26 or 37 unless counsel have first exhausted among themselves all extrajudicial means for resolving the differences."); CMO 8, ECF No. 1297 (directing that a discovery motion shall not be filed until the Court-appointed Mediator had a chance to resolve the issue).

IV.

In accordance with the foregoing, the Court **DENIES IN PART AND DENIES AS MOOT IN PART** Plaintiffs' Motion for a Protective Order and Sanctions Relating to DuPont's Attempt to Circumvent the Discovery Process. (ECF No. 4627).

IT IS SO ORDERED.

10-7-2016
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE